In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 991

ESTATE OF SOL SCHILDKRAUT, DECEASED, ET AL., PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

The decedent's will created a trust in the principal amount of $300,000, and directed the trustees to pay to his widow during her lifetime $1,000 per month out of trust income and, to the extent that income was insufficient, out of principal. The trustees were also directed to pay out of trust principal the federal and State income taxes on any sums paid to the widow from the trust, and the real estate taxes on certain property in Florida so long as she continued to own it. Any trust income in excess of $12,000 per year was to be paid to a designated charitable foundation. Upon the death of the widow, the remaining principal of the trust and any accrued income vested in the Foundation.

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The decision of the courts below that the trust did not qualify for the "marital deduction" is correct.[1] It is not, as petitioners assert (Pet. 7, 11), "probably in conflict" with the applicable provisions of the Code or the decisions of other courts of appeals. Nor is there any other reason for further review.

The widow's interest in the trust was clearly a "terminable interest" as defined in 1954 Code §2056(b)(1), since upon her death all of her interest in the trust terminated, and the trust property passed to someone other than her estate, *i.e.*, to the Foundation. Therefore, her interest in the trust does not qualify for a marital deduction unless it fits within Code § 2056(b)(5)'s exception to the terminable interest rule.

Section 2056(b)(5) grants a marital deduction only if the widow is entitled for life to all the income from a specific portion of the trust corpus plus a general power to appoint the specific portion of the corpus to herself or her estate. Whether the right to a fixed amount of income (here $12,000 per year) constitutes all the income from a specific portion of a trust is the

[1] The Tax Court held that no part of the trust qualified for either the marital deduction or the charitable deduction. The court of appeals reversed with respect to the charitable deduction and held that the trust qualified for such a deduction to the extent of the commuted value of the Foundation's remainder interest. Although we believe that the court of appeals erred in reversing the Tax Court's disallowance of the claimed charitable deduction, the government does not intend to file a petition for certiorari.

question now before this Court in two pending cases.[2] However, the Court need not hold this case pending outcome of those cases, since, in no event, does the widow have a general power of appointment over any portion of the trust corpus. On the contrary, the trust instrument gave the widow no explicit power of appointment over trust corpus, and she would have the right to obtain trust corpus for herself or her estate only to the extent that the trustee paid corpus to her during her lifetime.

Petitioner argues that if the widow lives for the period predicted by the mortality tables (26.11 years), the trustee will probably pay to her approximately $107,000 of corpus (Pet. 6). However, it is undisputed that if she had died shortly after her husband, neither she nor her estate would have received any part of the trust corpus. The Treasury Regulations clearly provide that a widow has the required power over trust corpus only if she has power, "alone and in all events," to designate herself or her estate as the recipient of trust corpus. Treas. Reg. § 20.2056 (b)–5(g). As this Court has recognized, the allowability of a marital deduction is "judged as of the time of the testator's death," *Jackson* v. *United States*, 376 U.S. 503, 509, and here it was impossible to predict at "the time of [decedent's] death" whether his widow would receive any corpus at all. Since she

[2] *Northeastern Pennsylvania Nat. B. & T. Co.* v. *United States*, 363 F. 2d 476 (C.A. 3), certiorari granted December 5, 1966, No. 637, this Term; *Citizens National Bank of Evansville* v. *United States*, 359 F. 2d 817 (C.A. 7), petition for certiorari pending, No. 488, this Term.

thus did not have a general power of appointment over trust corpus "exercisable alone and in all events," no marital deduction is allowable.[3]

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[3] The instant case is therefore wholly unlike the cases cited by petitioner (Pet. 12–14), where the surviving spouses had unconditional powers to dispose of trust corpus either during their lifetimes or by will, alone and in all events, even if they had died shortly after the decedent.

Nor does the fact that upon the termination of the widow's interest part of the trust corpus will be distributed to charity qualify her terminable interest for a marital deduction. See *United States* v. *Quivey*, 292 F. 2d 252 (C.A. 8); *Darby's Estate* v. *Wiseman*, 323 F. 2d 792 (C.A. 10). An interest passing to a surviving spouse qualifies for the marital deduction only where it satisfies the test specified by Congress. See *Jackson* v. *United States*, *supra*, pp. 509–511.

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